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No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN R. CONNOR,

Appellant,

vs.

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N. L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

John R. Connor, Pro se
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Millburn, New Jersey 07041
(201) 762-5587

24 April, 1987

QUESTIONS PRESENTED

1. Whether N.J.S.A. 2A:31-2 violates the Equal Protection Clause of the Fourteenth Amendment because of its differing standards for who may bring claims on behalf of the beneficiaries of a death action: if a decedent has died testate, only the executor or administrator, c.t.a., may prosecute a wrongful death action; if a decedent has died intestate, anyone beneficially interested may be appointed administrator ad prosequendum.*

2. Whether the order of the New Jersey Supreme Court dismissing the appeal in this matter and the judgment of the Appellate Division rest on adequate and independent state grounds, thus depriving the U. S. Supreme Court of jurisdiction.

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* This phrasing of the federal question eliminates references in the Appellate Division's version to death actions brought "on behalf of [decedent's] estate." Under New Jersey law, recovery under the statute forms no part of the estate of the deceased. Gottlieb v. North Jersey Street Ry. Co., 72 N.J.L. 480, 484-485 (E. & A. 1906).

PARTIES TO THE PROCEEDING

JOHN R. CONNOR, Appellant pro se
380 Wyoming Avenue
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R. G. SACHS, M.D., T. V. INGLESBY, M.D.,
J. A. BELLADONNA, M.D., N. L. MURRAY, M.D.,
C. J. WITTMAN, JR., M.D., Appellees

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(Thomas J. Alworth), for Appellees

OVERLOOK HOSPITAL, Appellee

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* Noticed of Appellant's challenge to the constitutionality of N.J.S.A. 2A:31-2, in accordance with New Jersey Rule 4:28-4.

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IN THE

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In the matter of

JOHN R. CONNOR,

Appellant,

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R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N. L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTION

JOHN R. CONNOR, the Appellant, appeals from the Final Order of the Supreme Court of

New Jersey, entered December 18, 1986 (App. B, infra, p. 2a), Motion for Reconsideration denied January 26, 1987 (App. A, infra, p. 1a), which dismissed Appellant's appeal of the Appellate Division's judgment in this matter (App. D, infra, pp. 4-8a), challenging the constitutionality of N.J.S.A. 2A:31-2, as written and applied to Appellant.

A Notice of Appeal to this Court was timely filed in the Supreme Court of New Jersey and the Appellate Division, on March 24, 1987, both courts being in possession of parts of the record. (App. Q, infra, pp. 32-34a).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2). Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921) sustains the jurisdiction of this Court to review the Final Order of the New Jersey Supreme Court and judgment of the Appellate Division by appeal in this case. The Appellate Division opinion is not reported.

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

> . . .[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New Jersey Constitution (1947), Article 6, Section 5, Paragraph 1 provides in part:

> 1. Appeals may be taken to the Supreme Court:
>
> (a) In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State;
>
> * * *
>
> (d) On certification by the Supreme Court. . .

N.J.S.A. 2A:31-2 provides:

> Every action commenced under this chapter shall be brought in the name of an administrator ad prosequendum of the decedent for whose death damages are sought, except where decedent dies testate, and his will is probated, in which event the executor named in the will and qualifying, or the administrator with the will annexed, as the case may be, shall bring the action.

N.J. Sup. Ct. C. P. R. 2:2-1(a) provides in part:

> Appeals may be taken to the Supreme Court from final judgments as of right: (1) in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State. . .

N.J. Sup. Ct. C. P. R. 2:2-1(b) provides in part:

> Appeals may be taken to the Supreme Court from final judgments on certification to the Appellate Division pursuant to R. 2:12.

STATEMENT OF THE CASE

The Appellant, JOHN R. CONNOR, is the son of decedent Mary A. Connor, who passed away on November 24, 1977 at Overlook Hospital in Summit, New Jersey. Decedent, who was suffering from an undiagnosed condition of pancreatitis, died as a result of cardiac shock following exploratory surgery. Under the terms of her will, Appellant was appointed executor, however, by virtue of a provision in the (1979) judgment admitting the will to probate, Appellant was prohibited from serving as executor.[1]

In 1978, the Superior Court of New Jersey appointed an Administrator (Warren) to represent the estate, after finding that "Mary A. Connor, late of the County of Essex and State of New Jersey, died on November 24, 1977, intestate. . ." (App. O, infra, p. 28a) (emphasis added).

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[1] Connor v. Phillips, cert. den. 455 U.S. 991, reh. den. 456 U.S. 939 (1982).

While Appellant was engaged in appealing the Warren appointment,[2] the Administrator, on September 21, 1978, secured a warrant for Appellant's arrest for an alleged contempt in connection with the estate. The warrant was never executed but was replaced on January 4, 1979 with a Supplementary Warrant which was executed eight months later on September 23, 1979, at which time Appellant was arrested and incarcerated in the Essex County jail for 4 days and only released upon his agreement to surrender possession of his mother's will to the Administrator. (No contempt was ever found by the court). However, while decedent's will was taken from Appellant on September 26, 1979, the document was not immediately probated by the Administrator. The probate hearing was not held until November 14, 1979 while the judgment granting probate (which simultaneously removed the Administrator and appointed an Administrator, C.T.A.)

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[2] Connor v. Warren, cert. den. 449 U.S. (1981).

was not signed by the court until December 3, 1979. On November 24, 1979, a date precisely in between the November 14th probate hearing and the filing of the probate judgment on December 4, 1979 - the two year period in which a Wrongful Death action had to be filed was due to expire.

Consequently, on November 15, 1979, Appellant wrote the Administrator and requested that he file a complaint for the wrongful death of his mother. By his letter of November 16th, Administrator Warren communicated his refusal to file the suit, as a result of which Appellant filed the complaint, himself, on November 21, 1979. The complaint is framed, in part, in Appellant's own right and, in part, in right of the Administrator: "JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor,

Robert L. Connor and Carol Moken." (See: App. E, infra, p. 9a).

* * *

The first phase of this litigation encompassed limited discovery by the parties, principally in the form of written and supplementary interrogatories and a Request for Admissions. However, on August 5, 1980, the matter was stayed while Appellant prosecuted a collateral suit in an ultimately unsuccessful attempt to reverse his exclusion as executor. Since 1980, Appellees had filed several motions to dismiss the action on the ground that Appellant lacked "standing" under N.J.S.A. 2A:31-2, which statute specifically provides that only an Executor or Administrator, C.T.A., can prosecute a wrongful death action where the decedent dies testate. Appellees' last such motion succeeded, on February 10, 1984, giving rise to the within appeal. (App. E, infra, pp. 9-10a).

Prior to the dismissal of this action in 1984, the trial court (located in Union County, New Jersey) made an "of record" effort to resolve the "standing" problem in this case by ordering Appellant to apply, first, to the Surrogate of Essex County (decedent's resident county) and, next, to the Probate Part of the Superior Court of New Jersey in Essex County for letters ad prosequendum. (App. F, infra, p. 11a and App. H, infra, p. 16a). Both applications were denied (App. G, infra, pp. 13-14a and App. I, infra, p. 17a). In the latter instance, Appellant's show cause papers were not even filed but returned with an explanation that "[t]he law of the State of N. J. does not provide for the appointment of an administrator ad prosequendum for any person dying testate." (App. I, infra, p. 17a). Appellant then moved before the Union County court in this matter for letters ad prosequendum, which application was denied by the trial court on June 7, 1983. (App. H, infra, p. 15a).

Following the dismissal of this action by the trial court, Appellant appealed to the Appellate Division of the Superior Court of New Jersey.

Two years later, on May 29, 1986, the Appellate Division issued a per curiam opinion which reversed the dismissal and remanded the case for further proceedings. (App. D, infra, pp. 4-8a). In its opinion, the appellate court declined to decide the constitutional issue raised by Appellant, stating: "[w]e need not reach the constitutional issue raised by plaintiff that N.J.S.A. 2A:31-2 violates equal protection of the law because of its differing standards for who may bring claims on behalf of testate and intestate estates. . ." Id., at 6a. The Appellate Division then remanded the case:

> to provide an opportunity to plaintiff, within 30 days of the date of our remand, to request Phillips to substitute as party plaintiff and to maintain the wrongful death action and to provide a further opportunity if

> Phillips refuses, within 30 days thereafter, to join Phillips as a party defendant in order to compel his substitution as plaintiff or, alternatively, to appoint the present plaintiff as administrator ad prosequendum.

Id., at 7a. Appellant's Motion for Reconsideration was denied on July 1, 1986. (App. C, infra, p. 3a). Appellant elected not to immediately carry out the terms of remand and filed an appeal with the New Jersey Supreme Court, arguing the constitutional invalidity of N.J.S.A. 2A:31-2 under the Equal Protection Clause of the Fourteenth Amendment. Appellee (respondent-physicians) moved for a dismissal on the ground that Appellant was not entitled to a second appeal and should, instead, have petitioned for certification. On December 18, 1986, the New Jersey Supreme Court entered an order dismissing the appeal, without explanation (App. B, infra, p. 2a), and denied Appellant's Motion for Reconsideration on January 26, 1987. (App. A, infra, p. 1a).

* * *

During the pendency of Appellant's appeal to the New Jersey Supreme Court, the trial court, on September 12, 1986, entered an order granting summary judgment and dismissing the complaint in this action as to defendant Overlook Hospital because of Appellant's "failure to comply with the [remand] decision of the Appellate Division filed on May 29, 1986." (App. J, infra, pp. 18-19a). The court found that Appellant, by not complying with the remand,"ha[d] waived and is estopped from any further claim of standing in this matter by its own conduct." (App. K, infra, pp. 20-21a).

On January 30, 1987, however, with a different judge presiding, the trial court denied the application for dismissal as to the remaining defendant-physicians and granted a stay of proceedings pending the result of the within appeal to the U. S. Supreme Court. (App. L and App. M, infra, pp. 22-25a).

The court's order denying dismissal stated that: "plaintiff has met the time limits set forth in the Appellate Division opinion filed May 29, 1986 because the time limits therein were tolled by the pendency of the appeal to the New Jersey Supreme Court, dismissed on December 18, 1986; and (2) plaintiff's application for a further stay pending final decision on plaintiff's application to the U. S. Supreme Court has been granted." (App. L, infra, p. 23a).

* * *

The federal question presented in this appeal, involving the constitutionality of N.J.S.A. 2A:31-2, was raised by Appellant in the trial court as a cross-motion in response to defendants' motion for dismissal. Specifically, Appellant cross-moved for a Declaratory Judgment adjudging the statute in violation of the Equal Protection Clause of the Fourteenth Amendment. Neither the cross-motion

(nor an alternative cross-motion to substitute the Administrator, C.T.A. as plaintiff) was decided by the trial court when it dismissed this action. (See: App. E, infra, pp. 9-10a).[3] In the Appellate Division, the federal question was raised by Appellant in his merits briefs and at oral argument, however, the appellate court declined to decide the issue. (See: App. D, infra, p. 6a). The federal question was again presented to the New Jersey Supreme Court, in Appellant's merits briefs and Motion for Reconsideration, however the court dismissed the appeal without explanation and without deciding the federal question. (See: App. A and B, infra, pp. 1-2a).

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[3] The Appellate Division's opinion erroneously stated that: "[p]laintiff appeals pro se from the dismissal on motion of the wrongful death action * * * and from the denial of his cross-motion to declare N.J.S.A. 2A:31-2 unconstitutional or, alternatively, to substitute Lucas E. Phillips, Jr., administrator of his mother's estate, as party plaintiff." (See: App. D, infra, p. 5a) (Emphasis added). In fact, the two cross-motions formed no part of the appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. Whether N.J.S.A. 2A:31-2 violates the Equal Protection Clause of the Fourteenth Amendment because of its differing standards for who may bring claims on behalf of the beneficiaries of a death action: if a decedent has died testate, only the executor or administrator, c.t.a., may prosecute a wrongful death action; if a decedent has died intestate, anyone beneficially interested may be appointed administrator ad prosequendum.

The federal question in this case, whether New Jersey may bar an interested beneficiary from filing a Wrongful Death action upon the Administrator's refusal to file suit is a new and substantial question which has specifically never been decided by either New Jersey courts or the U. S. Supreme Court.

N.J.S.A. 2A:31-2, the statute at issue in this appeal, governs who may prosecute a wrongful death action:

> Every action commenced under this chapter shall be brought in the name of an administrator ad prosequendum of the decedent for whose death damages are sought, except where decedent dies testate, and his will is probated, in which event the executor named in the will and qualifying, or the administrator with the will annexed, as the case may be, shall bring the action.

(Emphasis added). The reason for Appellant's constitutional challenge to the statute is because the trial court dismissed this suit, with prejudice, on a finding that Appellant who is neither executor or administrator, c.t.a., lacked "standing" to maintain the action under this statute. (App. E, infra, pp. 9-10a).

The individuals who are entitled to recover damages under the statute are those "persons entitled to take any intestate personal property of the decedent. . ." N.J.S.A. 2A:31-4. Thus, the right to recover damages caused by an offense is a property right of an interested beneficiary within the protection

of the Fourteenth Amendment:

> An action for wrongful death is brought for the exclusive benefit of the persons entitled to take intestate property of the decedent. N.J.S. 2A:31-4. The administrator ad prosequendum is merely a nominal representative of the class mentioned, since he acts as fiduciary for the general administrator who is charged with distribution of the funds recovered.

Glucksman v. Strelecki, 102 N.J. Super. 53, 58 (Law Div. 1968). (Emphasis added).

Historically in New Jersey, Wrongful Death actions were required to be brought in the name of the personal representative of the deceased. 2 Comp. Stat. 1904-1908, §8. However, the 1917 supplement to the Death Act provided for the institution of such actions in the name of an administrator ad prosequendum, where the decedent died intestate. Pamph. L. 1917, ch. 180, p. 531. In ascertaining the purpose of the 1917 supplement, the New Jersey Court of Errors and Appeals has found: "[s]uch representative ad prose-

quendum seems to be required only for the purpose of providing some person to prosecute the action. . ." Loughney v. Thomas, 117 N.J.L. 169, 172 (E. & A. 1936). The court also found such administrator to be "a mere trustee to bring and conduct the action. . ." Id., at 173. (Emphasis added).

Heretofore in New Jersey, N.J.S.A. 2A:31-2 has been strictly construed to prohibit any person, other than an executor or administrator, c.t.a., from prosecuting a Wrongful Death action, where the decedent dies testate. "No administrator ad prosequendum will be appointed to prosecute a death action where the decedent dies testate. An executor or administrator with the will annexed must prosecute the action." 8 Clapp, New Jersey Practice, Wills and Administration §716 at 297 (1985). In Schueler v. Strelinger, 43 N.J. 330 (1964), the New Jersey Supreme Court specifically held that a father had no

individual right of action under the Death Act for pecuniary loss as a result of his daughter's death, but that such cause of action "must be brought by an administrator ad prosequendum in case of intestacy, or by an executor where (as here) the decedent left a will." Id., at 349. (None of these cases, however, deals with a beneficiary bringing a death action upon the fiduciary's refusal to file suit).

However, where a decedent dies intestate, any person beneficially interested may receive letters ad prosequendum. N.J.S.A. 3B:10-11 (formerly N.J.S.A. 3A:6-13), which implements N.J.S.A. 2A:31-2, allows issuance of letters ad prosequendum "to the person entitled by law to general administration" (either the "surviving spouse," the "remaining heirs" or to "any other person as will accept the administration"). In point of fact and practice, "[t]hese letters may be

obtained not only in an action instituted by the widow or next of kin as plaintiff * * * but also in an action instituted by any interested person." Clapp, supra, at 296 n. 1 (1985).

Consequently, N.J.S.A. 2A:31-2, as written and applied, creates a dual office for the prosecution of wrongful death actions for intestate decedents (General Administrators, who receive and distribute the proceeds and Administrators Ad Prosequendum, who file the action); and any "interested" person may receive the letters. The very wide range of classes who are eligible to receive letters where there is an intestacy ("spouse," "next-of-kin" and "interested persons") narrows to only one individual where the decedent dies testate: the executor or administrator, c.t.a. Consequently, where there is an intestacy, the "opportunity" exists for a Wrongful Death suit to be filed where an administrator fails

or refuses to prosecute the action. No similar remedy is provided in the event of testacy, however, because the fiduciary has the exclusive right to bring a death action.

Thus a strict construction interpretation of N.J.S.A. 2A:31-2 (as applied against Appellant) not only invidiously discriminates against the spouse, next-of-kin and interested beneficiaries of the testate decedent but also their per se exclusion from administration ad prosequendum is entirely "arbitrary" because the exclusion depends solely on the nonrelevant criteria of whether the decedent left a will.

* * * *

The signifigance of the federal question here presented is manifest by the extreme length to which the state courts have gone in order to moot the federal issue in this appeal (see: Argument B, infra). Even though we are dealing with a question of first im-

pression, a brief review of applicable precedent indicates that N.J.S.A. 2A:31-2 violates the Equal Protection Clause, as written and applied to Appellant.

As long ago as 1903, the Supreme Court held that the equal protection "provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed." Field v. Barber Asphalt Co., 194 U.S. 618, 621-622 (1903). In Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1910), the Court, while affirming the wide scope of a State's discretionary power to classify for legislative purposes, stated:

> A classification having some reasonable basis does not offend against that [Equal Protection] clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

Id., at 78. (Emphasis added). However, the classifications "must be reasonable, not

arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1919). See also: Louisville Gas Co. v. Coleman, 277 U.S. 32 (1928). "Under our constitutional system the States in determining the reach and scope of particular legislation need not provide 'abstract symmetry' * * * 'the Constitution does not require things which are different in fact or opinion to be treated as though they were the same' * * * 'the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines and seeks to bring within the lines all similarly situated so far and so fast as the means allows.' " Skinner v. Oklahoma, 316 U.S. 535, 539-540 (1941). (Emphasis added).

In Ferguson v. Skrupa, 372 U.S. 726 (1963), the Court stated: "[s]tatutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." Id., at 732. Applying the test enunciated in Royster Guano Co., supra ("all persons similarly circumstanced shall be treated alike"), the Court found unconstitutional a Massachusetts statute that made it a felony for anyone to distribute contraceptives, except by a registered physician or pharmacist, and then only to a married person. The Court, in applying the rational basis test, found that "[e]nforcement of the * * * statute will materially impair the ability of single [unmarried] persons to obtain contraceptives." Eisenstadt v. Baird, 405 U.S. 438 (1972).

The classic interpretation of equal protection theory in Tussman and ten Broek, The Equal Protection of the Laws, 37 Calif. L.

Rev. 341 (1949), affords clarification as to determining whether a classification is "reasonable":

> where are we to look for the test of similarity of situation which determines the reasonableness of a classification? The inescapable answer is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law.

(Emphasis added).

The "purpose" of New Jersey's Wrongful Death statute is defined in N.J.S.A. 2A:31-1 which states that an action lies "[w]hen the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury. . ." Under the aforementioned criteria, N.J.S.A. 2A:31-2, as written and applied to Appellant, is

"invidiously" discriminatory because it does not treat alike all persons "similarly situated" ("spouse," "next of kin," "person interested") with respect to the purpose of the statute. This is not merely a situation betraying "some inequality," Lindsley, supra, but rather a total inequality where members of the aforesaid classes only possess the right to prosecute death actions in the event of an intestacy, and not at all where the decedent dies testate.

* * * *

The "substantiality" of the federal question in this appeal is evidenced by the New Jersey Supreme Court's ruling in the case of Schmoll v. Creecy, 54 N.J. 194 (1969). In Schmoll, supra, the trial court had found that illegitimate children could not recover damages under the Wrongful Death statute. In reversing for the children, the court asked:

"whether it is arbitrary to provide a [damages] remedy for a legitimate child and to deny a like remedy to an illegitimate child who sustained precisely the same injury." Id., 38 ALR 3d at 609.[4]

While the within appeal doesn't deal with the issue of damages and illegitimacy, but rather with the threshold question of standing-to-sue, this question is easily rephrased to apply to this case:

> Whether it is arbitrary to provide a remedy for an interested beneficiary of an intestate decedent and to deny a like remedy to the interested beneficiary of the testate decedent who sustained precisely the same injury?

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[4] In interpreting N.J.S.A. 2A:31-4, the damages section of the State's Wrongful Death statute, the State Supreme Court relied on the Supreme Court's decision in Levy v. Louisiana, 391 U.S. 68 (1967) which held Louisiana's death statute (La. Civ. Code Art. 2315) unconstitutional as construed to deny a right of recovery by illegitimate children, because it created an invidious discrimination contravening the Equal Protection Clause.

In contrast to New Jersey, the Wrongful Death statutes is some states specifically make allowance for the contingency when the personal representative fails or refuses to prosecute the suit. For example, Pennsylvania provides that "an action for wrongful death shall be brought only by the personal representative of the decedent. . ." Pa.R.Civ.P. §2202(a). However, in the event the personal representative fails to institute suit within six months of the decedent's death, then any person entitled by law to recover damages may sue on his own behalf. Pa.R.Civ.P. §2202(b). See: Beascoechea v. Sverdrup & Parcel and Assoc., Inc., 486 F. Supp. 169 (D.C. Pa. 1980).

In Cudney v. United Power & L. Corp., 142 Kan. 613 (1935), the Kansas Supreme Court interpreted a statute allowing a beneficiary to sue when no personal representative had been appointed, to apply to the situation

where a qualified administratrix had been discharged without prosecuting the wrongful death action.

In Harris v. Rex Coal Co., 177 Ky. 630 (1917), the Court of Appeals of Kentucky held that the mother of the decedent had the right to start a death action where an administrator attempted some sort of fraudulent settlement with the party responsible for decedent's death. "This she had a right to do upon the refusal of the administrator to sue, although the right of action was * * * originally in him." Id., 197 S.W. at 1075. (Emphasis added). This exception was upheld as recently as 1978 by the Supreme Court of Kentucky which ruled that: "[c]ontrary to the requirements of KRS 411.130, when a personal representative refuses to bring an action, the beneficiary may do so in her own name." Wheeler v. Hartford Acc. & Indem. Co., 560 S.W. 2d 816 (Ky. 1978).

In Bailes v. Southern Railway Company, 227 S.C. 176, 87 S.E.2d 481 (1955), the Supreme Court of South Carolina allowed a beneficiary to maintain a wrongful death action under circumstances where the brother's administrator had schemed to defraud the beneficiaries by settling the death claim for $450 without their knowledge and consent, and the administrator refused to file the death action. The statute provided that "an action for wrongful death 'shall be brought by or in the name of the executor or administrator,' " id. at 483, however, the court predicated its exception on the Law of Trusts:

> If a trustee refuse, after demand, to bring action in behalf of the trust estate or the beneficiaries thereof, or if he has an adverse interest or has conspired to defeat the trust, the beneficiary may himself bring the action against the third person, joining the trustee as a defendant. In doing so,

> the beneficiary is not enforcing his own cause of action, but is acting as a temporary representative of the trust. Bogert, Trusts and Trustees, Section 870, page 461; 54 Am. Jur. Trusts, Section 591, page 457 * * * The rule, which is frequently cited in other instances of trusteeship, is no less applicable where the trust relationship is that between an executor or administrator and the beneficiaries of a cause of action for wrongful death.

Id., 87 S.E.2d 484. (Emphasis added).

These decisions from the highest courts of other states are directly contra to the decision in the within appeal which, despite the Administrator's refusal-to-sue, is designed to effect the substitution of the Administrator, C. T. A., as plaintiff. (See: Argument B, infra). The result is especially anomalous in view of New Jersey's adherence to the exception to the general rule allowing beneficiaries to sue when the trustee fails or refuses to prosecute suits. See: Buchanan v. Buchanan, 75 N.J. Eq. 274,

71 A. 745, 746 (E. & A. 1909); Niemaseck v. Bernett Holding Co., 125 N.J. Eq. 284, 4 A.2d 794, 797 (Ch. Ct. 1939).

* * * *

The necessity of deciding the federal question in this appeal is further demonstrated by the ease with which a restrictive interpretation of N.J.S.A. 2A:31-2 in this case allowed "collusion" or "conspiracy" to surface between the personal representative and the defendants. See: Bailes, supra. In Appellant's Statement of the Case, infra, pp. 6-7, he related how the Administrator secured an arrest warrant for Appellant on September 21, 1978 and then waited a full year before executing it on September 23, 1979, having Appellant jailed for 4 days on the pretext of a contempt in order to gain possession of his mother's will - all the while, Appellant was still appealing from this fiduciary's

appointment, said appeal not being finally decided until 1981. (See: Statement of the Case, infra, n. 2, p. 6).

Can anyone seriously doubt that the real purpose of his actions was to prevent the filing of this suit? Particularly, when the probate, and exclusion of Appellant from his executorship, was conveniently delayed until 10 days after this suit had to be filed. These actions evidence a deep and pervasive conspiracy to defeat N.J.S.A. 2A:31-1 by creating a legal "limbo" in which, at the critical moment, an estate adjudged "intestate" was in process of becoming "testate," with an Administrator being replaced by an Administrator, C.T.A., after the former refused to file this suit.

Is this state of affairs one that, all intentions aside, is really outside the scope of N.J.S.A. 2A:31-2 which states that an action for Wrongful Death shall be brought

where there is a testacy when "decedent dies testate, and his will is probated, in which event the executor named in the will and qualifying. . ." N.J.S.A. 2A:31-2. (Emphasis added). In this case, the will of testate Mary A. Connor was not probated until December 4, 1979, and the new Administrator, C.T.A. did not qualify until a subsequent date. Isn't it arguable that this statute allows ample scope for judicial interpretation to permit an interested beneficiary to act when the intestate Administrator refused to file the action? Is this suit to fail because decedent Mary A. Connor died testate? Had there been no will, Appellant, regardless of the Administrator's refusal, could have received letters ad prosequendum a long time ago and the case would have been over.

The Supreme Court of New Jersey is not unfamilar with the practice, necessity and

advantage of judicial interpretation to avoid equal protection problems:

> In Schmoll, we interpreted the wrongful death statute to permit illegitimate children to recover despite the lack of any such provision in its explicit language and with knowledge that several amendments to place such a provision in the act failed to achieve passage. This construction was necessary to save the statute from constitutional infirmity as it otherwise would have denied equal protection guarantees.

State v. Zarinsky, 75 N.J. 101, 113 (1977).

Accordingly, due to the all-important necessity of closing a "loophole" inviting "collusion" in N.J.S.A. 2A:31-2, Appellant respectfully submits that this matter mandates plenary review by this Court. In addition, as further shown herein, the results reached by the New Jersey courts provide additional grounds for such review.

* * * *

B. Neither the Order of Dismissal of the New Jersey Supreme Court nor the judgment of the Appellate Division rest on Adequate and Independent State Grounds, thus this Court has jurisdiction.

In Ward v. Love County, 253 U.S. 17 (1920), the Supreme Court reaffirmed its rule that state courts cannot avoid deciding federal questions, and thereby defeat the Court's jurisdiction, by deciding a case on non-federal grounds which are without any fair or substantial support:

> Whether the right was denied, or not given due recognition, by the [state] Supreme Court is a question as to which the claimants were entitled to invoke our judgment * * * It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support (citations omitted) Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided.

Id., at 22. (Emphasis added).

The fact that a state's highest court declines review of a federal issue constitutes no bar to Supreme Court review. In Staub v. City of Baxley, 355 U.S. 313 (1958), the Court reversed the conviction of a labor organizer who violated a city ordinance which made it an offense to solicit dues-paying members without first applying for and receiving a permit. Although appellant claimed that the ordinance violated her First Amendment rights, the Georgia Court of Appeals declined to pass on the constitutional issue, ruling that appellant lacked the "standing" to attack the statute because she had made no attempt to obtain the permit whose constitutionality she was challenging. The Supreme Court found the nonfederal ground inadequate to bar review of the federal claim.

In Rogers v. Alabama, 192 U.S. 226 (1903) (a 2-page motion to quash a state murder indictment on ground of exclusion of colored persons from grand jury stricken on basis

of "prolixity"), the Supreme Court, in reversing judgment, stated that: "[i]t is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights." Id., at 230.

Especially relevant to the within appeal is Davis v. Wechsler, 263 U.S. 22 (1923) (a federal officer, attempting to claim a federal venue privilege, was found by the state court to have waived the defense when he failed to enter a "special" appearance under state law). In reversing judgment, the Court declared:

> We are of the opinion that the judgment must be reversed. Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not be be defeated under the name of local practice * * * it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way.

Id., at 24-25. (Emphasis added).

In the landmark case of Dahnke-Walker Co. v. Bondurant, 257 U.S. 282 (1921), the Supreme Court, in discussing the circumstances under which a state court decision will be reviewed on appeal (versus certiorari), stated that:

> In the state court the petitioner did not simply claim a right or immunity under the Constitution * * * but distinctly insisted that as to the transaction in question the Kentucky Statute was void, and therefore unenforceable, because in conflict with the commerce clause of the Constitution. The [state] court did not accede to the insistence, but applied and enforced the statute. Of course that was an affirmation of its validity when so applied * * * the mode of review depends on the way in which the state court resolves the question. If it be resolved in favor of the validity of the statute the review may be on a writ of error; and if it be resolved against the validity the review can only be on writ of certiorari.

Id., at 289. (Emphasis added).

In its per curiam opinion herein, the Appellate Division declined to decide

Appellant's constitutional challenge to N.J.S.A. 2A:31-2. However, an analysis of the decision's terms of remand,[5] reveal them to be a "springe-laden" device that, once executed, would not only immunize the statute from Appellant's constitutional challenge but would also apply the statute to the disadvantage of Appellant's federal claim - a decision "in substance and effect" wholly in favor of the statute. Dahnke, supra. This result would inevitably have ensued had Appellant, within the first 30-day period, contacted the Administrator, C.T.A., to request his substitution as party-plaintiff. Such conduct on Appellant's part would undoubtedly trigger a waiver of his federal claim to "standing" and automatically propel

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[5] "We remand to provide an opportunity to plaintiff, within 30 days of the date of our remand, to request Phillips to substitute as party plaintiff * * * and to provide a further opportunity if Phillips refuses, within 30 days thereafter, to join Phillips as a party defendant in order to compel his substitution as plaintiff or, alternatively, to appoint the present plaintiff as administrator ad prosequendum." (App. D, p. 7a).

Phillips into the suit as party-plaintiff.

That the Appellate Division is alert to consequences of waivers is seen in its decision in Sturdivant v. General Brass & Machine Corp., 115 N.J. Super. 224 (App. Div. 1971):

> It has been broadly asserted that any act on the part of a party by which he impliedly recognizes the validity of a judgment against him operates as a waiver of his right to appeal therefrom, or to bring error to reverse it, and clearly one who voluntarily acquiesces in or ratifies a judgment against him cannot appeal from it. The acquiescence which prohibits an appeal, or destroys it when taken, is the doing or giving of the thing which the decree commands to be done or given.

Id., at 227. (Quoting from 4 Am.Jur. 2d, Appeal and Error, §242 at 737).

The New Jersey Supreme Court is similarly vigilant with respect to waivers of constitutional claims. In Brogan v. The Passaic Daily News, 22 N.J. 139 (1956), that court declined to rule on a constitutional challenge to N.J.S.A. 2A:81-10 (newspapermens'

privilege against disclosure of source of published information) "in view of the fact that whatever immunity was conferred on the defendants by the statute was waived. . .," id. at 155, when the witness testified "that he received his information from 'a reliable source' and then testifying as to the information he had received." Id., at 154. See also: Henry v. Mississippi, 379 U.S. 443 (1965) (Supreme Court vacated judgment of conviction and remanded for a hearing on the question whether petitioner had knowingly waived a decision of his federal claim when timely objection was not made to the admission of illegally-seized evidence).

By ordering Appellant to re-enact the "request and refusal" scenario that originally occurred between Appellant and Administrator Warren in November, 1979, which refusal constitutes the basis of Appellant's claim to "standing" in this action, the Appellate Division attempted to change the

factual predicate underlying this action - seven (7) years after the two-year Statute of Limitations has expired. N.J.S.A. 2A:31-3. Such a re-enactment would create a limitations problem which the suit does not now possess, particularly in view of the Appellate Division's election to: "not resolve issues which may be raised on remand: whether the Statute of Limitations may be raised as a defense if Phillips is substituted as plaintiff. . ." (App. D, infra, p. 7a).

That the Appellate Division's remand terms have, as their intended result, the mooting of Appellant's federal claim through waiver and his replacement by the Administrator, C.T.A., is evidenced by the court's disregard of the fact that Phillips, by virtue of his being the successor in office to Administrator Warren, remains in privity with him. Phillips, therefore, as a matter of law, is bound by the original (1979) refusal of Ad-

ministrator Warren to file this suit.[6] As succinctly stated by the Southern District of New York:

> Privity between persons denotes the relationship arising out of mutual rights or successive rights in the same property or interest, as, for example, successors in a particular office, or assignee and assignor, or executor and testator. Acheson v. Albert, 90 U.S. App. D.C. 294, 195 F.2d 573 (1952); 72 C.J.S. Privity; Privies; Privy, pp. 954-962 (1951).

Mobay Chemical Co. v. Hudson Foam Plastics Corp., 277 F. Supp. 413 (S.D.N.Y. 1967).

The final "springe" set to guarantee the substitution of the Administrator, C.T.A., as party-plaintiff is found in the alternative remand term which provides that "if Phillips refuses, within 30 days thereafter, to join Phillips as a party defendant in order to

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[6] In its opinion, the Appellate Division attempted to exonerate Administrator Warren: "[Warren] declined to [file this action] on the ground that his appointment as administrator was for a limited purpose only." (App. D, infra, p. 5-6a). However, the judgment appointing Warren, and his Letters of Administration, evidence a general, not a limited appointment. (App. O and P, infra, 28-31a).

compel his substitution as plaintiff. . ." (App. D, infra, p. 7a). (Emphasis added). With Appellant's constitutional waiver having already occurred in the first 30-day period, this "option" would have remained the sole alternative remedy. However, this "novel" procedural device of joining-a-defendant-in-order-to-make-him-a-plaintiff finds no support in the law. It represents a corruption of the Law of Trusts, wherein the "non-suing" trustee is joined as a defendant by the plaintiff-cestui que trust to remain a defendant and not to replace the cestui que as plaintiff. Quoting from the New Jersey Court of Errors and Appeals:

> the only exception to the rule above stated [only a duly-appointed administrator is competent to sue, either at law or in equity] arises when, although there is an administrator, he neglects or refuses to prosecute suits for the recovery of his decedent's estate. In such case, the next of kin may sue * * * joining the personal representative as a party defendant.

Buchanan v. Buchanan, 75 N.J. Eq. 274, 71 A. 745, 748 (1909). See also: Niemaseck v. Bernett Holding Co., 125 N.J. Eq. 284 (Ch. Ct.

1939).

In final support of Appellant's contention that the Appellate Division's terms of remand are designed to "springe" the federal issue, and Appellant, out of the case entirely, one need only review the proceedings held in this action on September 12, 1986 when, notwithstanding the pendency of this appeal in the New Jersey Supreme Court, the trial court dismissed the complaint as to defendant-Overlook Hospital "for failure to comply with the [remand] decision of the Appellate Division filed on May 29, 1986." (App. J, infra, pp. 18-19a). The court, unable to find a waiver of the federal issue on the ground that Appellant had contacted the Administrator, C.T.A., proceeded and found an estoppel because Appellant had not done so:

> Accordingly, it's this Court's finding * * * that there would not be a standing by this plaintiff to go forward or failure to show that it had standing or had complied with the Appellate Division pre-requisites to obtain

> standing * * * and, therefore, has waived and is estopped from any further claim of standing in this matter by its own conduct.

(App. K, infra, p. 21a). (Emphasis added).

The foregoing analysis establishes that the "non-federal grounds" disposition of this appeal by the Appellate Division is "without any fair or substantial support" in the controlling law, Ward v. Love County, supra, and that the "fair result of [the] decision is to deny the [federal] rights" entirely. Rogers v. Alabama, supra. Consequently, because the decision effectively substitutes the Administrator, C.T.A., for Appellant in this suit, it is, in fact, totally "in favor of" N.J.S.A. 2A:31-2. Dahnke, supra. Appellant, therefore, is entitled to Supreme Court appellate review under 28 U.S.C. §1257(2).

* * * *

Appellant's "as of right" appeal to the New Jersey Supreme Court was dismissed, without explanation, upon Appellees' motion arguing that Appellant did not have a right to a

second appeal, under R. 2:2-1(a), but should have petitioned for certification. R. 2:2-1(b). The dismissal is arbitrary and egregiously wrong, as a matter of state procedural law.

In N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), the Supreme Court (in upholding petitioner's due process claim that production of its membership lists trespassed upon their "liberty" interests) first addressed the state's contention that it lacked jurisdiction "because the denial of certiorari by the Supreme Court of Alabama rest[ed] on an independent nonfederal ground, namely, that petitioner in applying for certiorari had pursued the wrong appellate remedy under state law." Id., at 454-455. The state supreme court had refused to consider petitioner's federal questions, declaring that they could only be raised by way of mandamus. However, in light of earlier state decisions indicating that certiorari and mandamus were both available as alternative

remedies, the Supreme Court, in rejecting the State's "independent nonfederal ground" argument, upheld its jurisdiction to entertain the federal claim, stating:

> Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.

Id., at 457-458. (Emphasis added). That state decisional consistency is the due process test for determining noncompliance with local procedural rules was reaffirmed by the Court in Bouie v. City of Columbia, 378 U.S. 347 (1963):

> The basic due process concept involved is the same as that which the Court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question.

Id., at 354. "[S]tate procedural requirements

which are not strictly or regularly followed cannot deprive us of the right to review." Barr v. City of Columbia, 378 U.S. 146, 148 (1964).

Art. 6, §5, ¶1 of the New Jersey Constitution provides, in pertinent part, that:

> 1. Appeals may be taken to the Supreme Court:
>
> (a) In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State;
>
> * * * * *
>
> (d) On certification by the Supreme Court. . .

In implementing Art. 6, §5, ¶1, the New Jersey Court Rules have added the additional qualification that the constitutional question be "substantial." R. 2:2-1(a)(1).

In the leading case of Tidewater v. Mayor and Council of Cartaret, 44 N.J. 328 (1965), the New Jersey Supreme Court established the guidelines for determining when a party may, without grant of certiorari, appeal to the

Supreme Court in a case involving a constitutional question:

> there must appear indication of true merit from the constitutional point of view, i.e., that the issue tendered is not frivolous and has not already been the subject of a conclusive judicial determination * * * Also, it should be noted that constitutional issues signifigant in the early development of a new area for such appeal purposes may become so settled through the course of judicial decisions as one day to become no longer worthy of a second review without leave. We conclude that cases falling into the type of this one are not appealable from the Appellate Division as of right.

Id., at 342-343. See: In re Windsor Mun. Util. Auth. v. Shapiro, 57 N.J. 168, 170 (1970); Deerfield Estates, Inc. v. Tp. of East Brunswick, 60 N.J. 115, 119-120 (1972). (Emphasis added).

The New Jersey Supreme Court's rule that "new" constitutional questions of substance proceed via appeal, and not by certification, was immediately reaffirmed by that court:

> The occasion arose recently to discuss the increasing number of direct appeals being taken under R.R. 1:2-1(a) where the asserted constitutional question has been clearly and conclusively settled * * * In such cases the proper avenue to be employed in seeking a direct review in this court is petition for certification, not appeal. . .

State v. Boyd, 44 N.J. 390 (1965). (Emphasis added).

As a matter of record, there exists no prior decision in New Jersey courts adjudicating an equal protection challenge to N.J.S.A. 2A:31-2. Moreover, all previous interpretations of this statute have construed this section to bar anyone, other than an executor or administrator, c.t.a., from maintaining a death action where the decedent dies testate. See: Schueler v. Strelinger, 43 N.J. 330 (1964). The "substantiality" of the equal protection issue in this appeal is evidenced in the analagous case of Schmoll v. Creecy, 54 N.J. 194 (1969) where the New Jersey Supreme Court allowed a second ("as of right") appeal on an

equal protection challenge to N.J.S.A. 2A:31-4, the "damages" section of New Jersey's Wrongful Death statute:

> and an appeal was taken to us as of right * * * because of the constitutional issue whether the denial of relief to these children because of their illegitimacy offends the equal protection clause of the Federal Constitution.

Id., at 194. (Emphasis added). In reversing judgment, the New Jersey Supreme Court held that, because the injury sustained by the illegitimate children was indistinguishable from the injury they would have sustained had they been born in wedlock, it would deny them equal protection of the law to refuse them a remedy granted to legitimate children.

Consequently, the within appeal falls within the Tidewater guidelines which established that "new" constitutional questions of substance proceed to the New Jersey Supreme Court via appeal and not the discretionary procedure of certification. Had the consti-

tutional question been "clearly and conclusively settled," State v. Boyd, supra, then certification would have been the correct mode of review. The question, however, being clearly "open," Appellant was entitled to an "as of right" appeal to the New Jersey Supreme Court. R. 2:2-1(a). Moreover,

> Whether or not a litigant is * * * deprived of a hearing to an extent forbidden by the due process clause essentially depends upon whether the posture adopted by the state court is arbitrary in the light of prior indications of the governing law; that is, on whether there has been a retroactive overruling of the procedural law in substance if not in form * * * due process is denied by any decision which * * * fails to give effect to, a rule of law that the state is constitutionally compelled to apply * * * The arbitrary denial of a federal claim is clearly reversible error. . .

Hill, The Inadequate State Ground, 65 Colum. L. Rev. 961-962 (1965). (Emphasis added). As succinctly stated in United States ex rel.

Herring v. Fenton, 531 F.Supp. 937 (1981): "when there is an appeal of right on a federal constitutional question, the Supreme Court of New Jersey has no discretion to decline to hear it. It is obliged to hear and decide it on the merits, by reason of N. J. Const. 1947, Art. 6, sec. 5, par. 1(a), quoted above. Neither the Legislature, by statute, nor the Supreme Court, by 'rule of practice and procedure,' can deny or degrade that State constitutional right." Id., at 946.

The New Jersey Supreme Court's dismissal of Appellant's appeal upon Appellee's argument that Appellant had pursued the wrong mode of appeal is therefore an "arbitrary" decision that is inconsistent with Art. 6, §5, ¶1(a) of the State Constitution and the prior interpretive decisions of that court, as enunciated in Tidewater v. Mayor and Council of Cartaret, supra, and applied in Schmoll v. Creecy, supra. The nonfederal ground is, therefore, inadequate to bar Supreme Court

review of the federal issue in this appeal.

* * * * * *

Generally, the Supreme Court's appellate jurisdiction has been exercised over state litigation only when a state's highest court has rendered a "[f]inal judgment or decree." 28 U.S.C. §1257. However, there is an exception when, although the highest state court has finally decided the federal question and there remain further proceedings in the lower state courts (even entire trials), the Supreme Court "has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. §1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477 (1975).

In California v. Stewart, 384 U.S. 436 (1966)(decided with Miranda v. Arizona), the

Supreme Court granted certiorari and affirmed a state court's reversal, and remand, of a conviction on federal constitutional grounds. Although the state might have again secured a conviction, the Supreme Court deemed the state judgment "final" in view of the "possibility" of an acquittal which, under state law, would have precluded a second appeal by the state.

In North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973), the State Supreme Court held unconstitutional a statute which predicated a pharmacy operating permit on ownership requirements, and ordered a remand to the State Board. "After reviewing the various circumstances under which the finality requirement has been deemed satisfied despite the fact that litigation had not terminated in the state courts, we entertained the case over claims we had no jurisdiction. The federal

issue would not survive the remand, whatever the result of the state administrative proceedings." Cox, supra, at 482. (Emphasis added).

Accordingly, the within appeal falls within the third category enunciated by the Court in Cox, supra:

> where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case.

Id., at 481.

The present posture of the within appeal admits of further proceedings at the trial level, which conceivably could encompass a trial on the merits or perhaps nothing more than entry of an order dismissing the complaint as to the remaining defendant-physicians, defendant-Overlook Hospital having already been removed from the suit by order of the trial court entered September 12, 1986.

(App. J, infra, p. 18-19a). What is reason-certain is that, if the Supreme Court now declines review, the federal issue will "not survive the remand," Cox, supra, because of the waiver "springe" structured into the Appellate Division's remand formula.[7] In fact, not only would the federal issue not survive but also the entire case would probably be barred because of limitations.

In its opinion, the Appellate Division, declining to decide the limitations question, cited to the case of Wilson v. Dairymen's & c., Inc., 105 N.J.L. 188 (E. & A. 1928) "holding that a defendant is not prejudiced in an action brought within the Statute of Limitations by the substitution of the proper party plaintiff after the expiration of the two-

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[7] Appellant's cross-motion, pending since February, 1984, for a Declaratory Judgment adjudging N.J.S.A. 2A:31-2 unconstitutional, would also fail because of the waiver. Appellant's alternative cross-motion to substitute the Administrator, C.T.A., was withdrawn from the suit on January 30, 1987.

year period of limitations. . ." (App. D, infra, pp. 7-8a). In Wilson, supra, the New Jersey Court of Errors and Appeals allowed a post-limitations amendment of the plain- from the capacity of general administratrix to administratrix ad prosequendum, which designation the court deemed a mere "correction of a technical mistake." Id., 143 A. at 455. The plaintiff (Mrs. Wilson) was the same person and possessed fiduciary status from commencement of the action. In the case herein, we are dealing with an entirely different factual situation, where the action was filed by one having neither statutory standing nor any official capacity. Moreover, on the date this suit had to be filed, the estate was legally adjudged "intestate," albeit it was testate, and the Administrator, possessing decedent's unprobated will, refused to file this suit. It is quite possible that under these facts, the trial court would never ap-

ply the holding in Wilson, supra, but, more likely, that the negative holding in Jarvis v. Johnson, 3 N.J. Misc. 777 (Sup. Ct. 1925) would be the controlling precedent. In Jarvis, supra, the court, in allowing another amendmendment from Administratrix to Administratrix ad prosequendum, stated:

> This is not a situation where the suit was brought by one not possessing the requisite statutory qualifications. The plaintiff is the administratrix ad prosequendum. If she were not, she, of course, could not maintain this suit. Nor could she now acquire a status to proceed with the action for the reason that the two years' limitation within which such an action may be brought under the Death Act has expired. But her right to sue was acquired when she qualified as administratrix ad prosequendum and her suit was commenced within statutory time.

Id., at 778. (Emphasis added).

The history of this case since it was filed nearly 8 years ago, evidences a consistent unwillingness on the part of the New Jersey courts to properly resolve the "standing" (federal) issue raised by Appellant -

the only legal issue raised by Appellant on appeal; the state courts have merely engaged in one delaying tactic after another. As recounted in the Statement of the Case, infra, pp. 8-14, these tactics include: the trial court's directions to Appellant to apply to a different county's Surrogate and court for letters ad prosequendum, which applications were unsuccessful; the trial court's own denial of Appellant's application for issuance of letters on June 7, 1983; the 1984 dismissal of this suit by the trial court for "lack of standing," while failing to decide Appellant's cross-motion on his constitutional challenge to N.J.S.A. 2A:31-2; the refusal of the Appellate Division to decide the constitutional question and, after two years, producing, instead, a remand formula designed to moot the federal question entirely; and, finally, the refusal of the New Jersey Supreme Court to allow an "as of right" appeal on the constitutional issue, a decision that is

inconsistent with its own rulings on the criteria governing second "as of right" appeals.

In Cox, supra, the Supreme Court, in accepting jurisdiction of an appeal involving a federal question where additional proceedings remained, gave as one of its reasons:

> and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice,' Radio Station WOW, Inc. v. Johnson, supra, at 124...

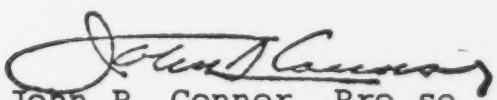
Id., at 477-478. For the identical reason, inter alia, Appellant's 8-year Calvary to acquire the legal standing to continue prosecution of this Wrongful Death suit to determine the defendants' liability for the death of Mary A. Connor, should now come to a close with the Supreme Court's acceptance of jurisdiction to review the New Jersey decisions in this case.

* * *

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal. However, in the event this Court's appellate jurisdiction under 28 U.S.C. §1257(2) is not appropriate here, Appellant requests review by writ of certiorari under 28 U.S.C. §1257(3). See: 28 U.S.C. §2103.

Respectfully submitted,



John R. Connor, Pro se

Dated: 24 April, 1987

APPENDIX "A"
(Filed: January 26, 1987)

SUPREME COURT OF NEW JERSEY
M-496 SEPTEMBER TERM 1986

26,036

JOHN R. CONNOR, etc.,	:	
	:	
Plaintiff-Movant,	:	
	:	ORDER
vs.	:	
	:	
R. G. SACHS, M. D., et al.,	:	
	:	
Defendants-Respondents.	:	
	:	

This matter having been duly presented to the Court, it is ORDERED that the plaintiff's motion for reconsideration of this Court's order of December 18, 1986 dismissing the appeal is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 21st day of January, 1987.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX "B"

(Filed: December 18, 1986)

SUPREME COURT OF NEW JERSEY
M-334 SEPTEMBER TERM 1986

26,036

JOHN R. CONNOR, etc.,	:	
	:	
Plaintiff-Respondent,	:	
	:	
vs.	:	ORDER
	:	
R. G. SACHS, M.D., et al.,	:	
	:	
Defendants-Movants.	:	

This matter having been duly presented to the Court, it is ORDERED that the motion to dismiss the appeal (A-138) is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 16th day of December, 1986.

/s/ Stephen W. Townsend

CLERK OF THE SUPREME COURT

APPENDIX "C"
(Filed: July 1, 1986)
ORDER ON
MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3491-83T3
MOTION NO. M-4504-85
BEFORE PART G

JUDGES: FURMAN
PETRELLA
COHEN

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor, etc

vs

R. G. SACHS, M. D., ET AL

MOVING PAPERS FILED June 11, 1986
ANSWERING PAPERS FILED
DATE SUBMITTED TO COURT June 24, 1986
DATE ARGUED
DATE DECIDED June 27, 1986

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

MOTION FOR RECONSIDERATION D E N I E D

FOR THE COURT:

/s/ David D. Furman, P.J.A.D.
DAVID D. FURMAN P.J.A.D.

WITNESS, THE HONORABLE DAVID D. FURMAN, PRESIDING JUDGE OF PART G, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 27 DAY OF JUNE 1986.

/s/ Elizabeth McLaughlin
CLERK OF THE APPELLATE DIVISION

APPENDIX "D"

(Filed: May 29, 1986)

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3491-83T3

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiff-Appellant,

v.

R.G. SACHS, M.D., T.V. INGLESBY, M.D., J.A. BELLADONNA, M.D., N.L. MURRAY, M.D., C.J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants-Respondents.

Argued April 28, 1986 - Decided May 29, 1986

Before Judges Furman, Petrella and Cohen.

On appeal from the Superior Court, Law Division, Union County.

John R. Connor, appellant, argued pro se.

Mark D. DiGidio argued the cause for respondents R.G. Sachs, M.D., T.V. Inglesby, M.D., J.A. Belladonna, M.D., N.L. Murray, M.D., and C.J. Wittman, Jr., M.D. (Shanley & Fisher, attorneys; Thomas J. Alworth and Mark W. Lynch, on the brief).

R. Scott Eichorn argued the cause for respondent Overlook Hospital (McDonough, Murray and Korn, attorneys; Robert J. Logan, on the brief).

PER CURIAM

Plaintiff appeals pro se from the dismissal on motion of his wrongful death action on behalf of the beneficiaries of his mother's estate and from the denial of his cross-motion to declare N.J.S.A. 2A:31-2 unconstitutional or, alternatively, to substitute Lucas E. Phillips, Jr., administrator of his mother's estate, as party plaintiff.

Plaintiff instituted this action on November 21, 1979, within two years of his mother's death on November 24, 1977. He had been named executor in her will but had not qualified. An administrator had been appointed to submit plaintiff's mother's will for probate. Plaintiff requested the administrator to file this wrongful death complaint. He declined to do so on the ground that his appointment as ad-

ministrator was for a limited purpose only. The will was probated and Phillips appointed on December 4, 1979.

We need not reach the constitutional issue raised by plaintiff that N.J.S.A. 2A:31-2 violates equal protection of the law because of its differing standards for who may bring claims on behalf of testate and intestate estates: if a decedent has died testate, only the executor or administrator c.t.a. may prosecute a wrongful death action on behalf of his estate; if a decedent has died intestate, anyone beneficially interested may be appointed administrator ad prosequendum.

The trial court denied plaintiff's cross-motion to substitute Phillips in his stead as plaintiff on the sole ground that plaintiff had "presented no evidence that Lucas Phillips is now the administrator." At oral argument we were informed that Phillips is still serving as administrator c.t.a.; he has never formally

declined to be substituted as plaintiff or to maintain the wrongful death action.

Accordingly, we reverse the dismissal of plaintiff's complaint, which was based upon his lack of standing under N.J.S.A. 2A:31-2. We remand to provide an opportunity to plaintiff, within 30 days of the date of our remand, to request Phillips to substitute as party plaintiff and to maintain the wrongful death action and to provide a further opportunity if Phillips refuses, within 30 days thereafter, to join Phillips as a party defendant in order to compel his substitution as plaintiff or, alternatively, to appoint the present plaintiff as administrator ad prosequendum.

We do not resolve issues which may be raised on remand: whether the Statute of Limitations may be raised as a defense if Phillips is substituted as plaintiff, see Wilson v. Dairymen's, & c., Inc., 105 N.J.L. 188 (E. & A. 1928) holding that a defendant is not preju-

diced in an action brought within the Statute of Limitations by the substitution of the proper party plaintiff after the expiration of the two-year period of limitations; whether appointment as administrator ad prosequendum of a person beneficially interested, upon refusal of Phillips to be substituted as plaintiff, is within the trial court's authority as an implicit exception to N.J.S.A. 2A:31-2; or, if not, whether, N.J.S.A. 2A:31-2 is unconstitutional.

We reverse and remand in accordance herewith. We do not retain jurisdiction.

APPENDIX "E"

(Filed: February 14, 1984)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION UNION COUNTY

Docket No. L-14573-79

CIVIL ACTION

ORDER

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiff(s)

v.

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMAN, JR., M. D. and OVERLOOK HOSPITAL,

Defendant(s)

This matter having been brought before the Court on motion of Shanley & Fisher, P. C., attorneys for defendants Sachs, Inglesby, Belladonna, Murray and Wittman for an Order dismissing the Complaint with prejudice due

to the plaintiff's lack of standing, and the Court having considered the matter and good cause appearing,

It is on this 10th day of February, 1984, ORDERED

that the Complaint filed herein be and the same is hereby dismissed with prejudice and without costs, as to all defendants.

/s/ Harry V. Osborne, J.
Harry V. Osborne, J.S.C.

APPENDIX "F"

(Filed: April 15, 1983)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO. L-14573-79

CIVIL ACTION
(Medical Malpractice)

ORDER

JOHN CONNOR, et als., :

Plaintiffs, :

-vs- :

R. G. SACKS, et als., :

Defendants. :

JUDGE: Honorable Harry V. Osborne, Jr.

DATE: Friday, March 25, 1983.

PARTIES PRESENT OR REPRESENTED: John R. Connor, pro se, plaintiff and Robert L. Logan, Esq. (McDonough, Murray & Korn, P.A.)

ORDERED: 1. That plaintiff, John R. Connor shall qualify as administrator ad prosequendum of the Estate of Mary A. Connor within 20 days of the date of this order.

2. If plaintiff fails to qualify as administrator ad prosequendum within this time period, the plaintiff's complaint is dismissed for lack of standing.

3. That a copy of this Order shall be served upon attorneys for all parties within 7 days of the date of this order.

4. Plaintiff's cross motion for a stay pending decision of an appeal in Connor v. Besser et al is denied.

/s/ Harry V. Osborne Jr.
Honorable Harry V. Osborne, Jr.
Judge of the Superior Court

Dated: April 13, 1983

APPENDIX "G"

(Filed: May 2, 1983)

Docket No. 12,923 J

ESSEX COUNTY SURROGATE'S COURT

ADJUDICATION THAT DOUBTS AND DIFFICULTIES ARISE ON COMPLAINT FOR ADMINISTRATION AD PROSEQUENDUM

In the matter of the estate)
)
of Mary A. Connor)
)
deceased)

On Complaint for Administration Ad Prosequendum of John R. Connor, son of the deceased, and it being shown that the Last Will and Testament of Mary A. Connor was probated by an Order of the Superior Court of New Jersey, Chancery Division - Essex County dated December 3rd, 1979 and Lucas E. Phillips, Jr., Esq., was appointed Administrator with the Will Annexed:

It is thereupon on this 2nd day of May, 1983, pursuant to the statute in such case made and provided adjudged that difficulties arise upon the appointment of the said Com-

plainant.

NICHOLAS R. AMATO
Surrogate

By: /s/ Barbara J. DeBartola
Special Deputy Surrogate

APPENDIX "H"

(Filed: June 7, 1983)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO. L-14573-79

JOHN R. CONNOR, et als,	:	Civil Action
Plaintiffs,	:	ORDER
vs.	:	
R. G. SACHS, M.D., et als,	:	
Defendants.	:	

This matter having been opened to the Court by the plaintiff pro se, John R. Connor, in the presence of Shanley & Fisher, P. C., by Thomas J. Alworth, Esq. and McDonough, Murray & Korn, Esqs., by Stephanie Briody, Esq., and the Court having considered the moving papers, supporting documentation and the arguments of counsel, and for cause shown

It is on this 6th day of June, 1983

ORDERED that plaintiff's motion for the entry of an order granting Letters Ad Prosequendum to the plaintiff be and the same is

hereby denied.

IT IS FURTHER ORDERED that the plaintiff, John R. Connor, shall apply to the Superior Court, Probate Part, Essex County, on or before June 17, 1983 for an Order granting Letters Ad Prosequendum to the plaintiff.

IT IS FURTHER ORDERED that further proceedings in this matter shall be stayed pending a resolution by the Superior Court, Probate Part, Essex County, of the aforementioned application to be initiated by John R. Connor.

IT IS FURTHER ORDERED that upon resolution of the matter to be filed in the Superior Court, Probate Part, Essex County, any of the parties hereto may then seek whatever relief they deem appropriate from this court.

/s/ Harry V. Osborne, Jr.
Harry V. Osborne, J.S.C.

APPENDIX "I"

ESSEX COUNTY SURROGATE'S COURT
Hall of Records
Newark, N. J. 07102

June 30, 1983

John R. Connor, Pro se
380 Wyoming Avenue
Millburn, NJ 07041

RE: In the Matter of the Estate of
Mary A. Connor

Dear Mr. Connor:

The law of the State of N.J. does not provide for the appointment of an administrator ad prosequendum for any person dying testate.

Accordingly, Judge Thompson has directed that your mailing, dated June 17, 1983, which was received by the Surrogate on June 28, 1983, be returned to you.

Please find said mailing enclosed, includ- your check for $20.00.

Very truly yours,

NICHOLAS R. AMATO, SURROGATE

/s/ George R. Boutillier
By: George R. Boutillier,
Assignment Clerk

GRB/pt

APPENDIX "J"

(Filed: September 12, 1986)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO. L-14573-79

CIVIL ACTION
(Medical Malpractice)

ORDER GRANTING SUMMARY JUDGMENT ON BEHALF OF DEFENDANT, OVERLOOK HOSPITAL, OR, IN THE ALTERNATIVE, DISMISSING PLAINTIFFS' COMPLAINT

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor, etc., :

Plaintiffs, :

-vs- :

R. G. SACHS, M.D., et als, :

Defendants. :

JUDGE:

DATE OF MOTION: Friday, September 12, 1986, at 9:00 a.m.

PARTIES PRESENT OR REPRESENTED: None. The matter was submitted on the papers.

ORDERED: 1. That summary judgment is hereby granted in favor of defendant, Overlook Hospital.

2. Plaintiffs' Complaint is hereby

dismissed for failure to comply with the decision of the Appellate Division filed on May 29, 1986.

3. A copy of this Order shall be served upon attorneys for all parties within 7 days of the date of this Order.

FOR THE REASONS SET FORTH
BY THE COURT ON THE RECORD
ON Sept 12, 1986

/s/ Leonard S. Sachar
LEONARD S. SACHAR
J.S.C.

DATE OF
ORDER: 9-12-86

APPENDIX "K"

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CIVIL
DOCKET NO. L-14573-79

JOHN R. CONNOR, :

Plaintiff, : TRANSCRIPT OF PROCEEDINGS

-vs- : Motion

SACHS, et al, :

Defendant. :

- - - - - - - - - - - -

Friday, September 12, 1986
Union County Courthouse
Elizabeth, New Jersey

ORDERED BY:
JOHN R. CONNOR, pro se

BEFORE:
THE HONORABLE LEONARD R. SACHAR, J.S.C.

APPEARANCES:

JOHN R. CONNORS, pro se

MESSRS. McDONOUGH, MURRAY & KORN
Attorneys for Overlook Hospital
By: MELINDA FABRICANT, ESQ.

ANDREA MR. SANNIOLA
Official Court Reporter
License No. X101097

(Partial transcript)

[23] THE COURT: . . . In addition, the Court finds that the Appellate Division has set forth its conditions for the plaintiff to avail himself of requests to continue [24] and to have standing, that it was understood by the plaintiff that the plaintiff has chosen not to pursue the direction of the Appellate Division, has not secured a stay. Accordingly, it's this Court's finding that the complaint, even if it had not been dismissed by the Court, which it is on summary judgment, that there would not be a standing by this plaintiff to go forward, or failure to show that it had standing or had complied with the Appellate Division pre-requisites to obtain standing has not pursued the course open to the plaintiff to pursue standing and acquired standing and, therefore, has waived and is estopped from any further claim of standing in this matter by its own conduct. Therefore, the order of the defendant Overlook Hospital will be signed.

APPENDIX "L"

(Filed: January 30, 1987)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION UNION COUNTY

Docket No. L-14573-79

CIVIL ACTION

JOHN R. CONNOR, et al., Plaintiff, vs. R. G. SACHS, M.D., et al., Defendants.	ORDER DENYING DISMISSAL

The matter having been brought before the Court on motion of Shanley & Fisher, P.C. attorney(s) for defendants Sachs, Inglesby, Belladonna, Murray & Wittman for an Order to dismiss the Complaint with prejudice,

and the Court having considered the matter and no good cause appearing,

It is on this 30th day of January, 1987, ORDERED that the request that the Complaint filed herein as against the defendants Sachs, Inglesby, Belladonna, Murray & Wittman be and

the same is hereby denied, because (1) plaintiff has met the time limits set forth in the Appellate Division opinion filed May 29, 1986 because the time limits therein were tolled by the pendency of the appeal to the New Jersey Supreme Court, dismissed on December 18, 1986; and (2) plaintiff's application for a further stay pending final decision on plaintiff's application to the U. S. Supreme Court has been granted.

A copy of this order shall be served within five (5) days of receipt on all interested parties.

/s/ Barbara Byrd Wecker...
BARBARA BYRD WECKER, J.S.C.

APPENDIX "M"

(Filed: January 30, 1987)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO. L-14573-79

In the matter of:

JOHN R. CONNOR, etc.,	:	
	:	Civil Action
Plaintiff,	:	
	:	
v.	:	ORDER
	:	FOR STAY
R. G. SACHS, M.D., et als.,	:	
	:	
Defendants.	:	

The matter having been brought before the court on January 30, 1987 on the cross-motions of Plaintiff pro se, and the Court having considered the matters and good cause appearing:

1. It is on this 30th day of January, 1987 ORDERED that the within suit is stayed pending final disposition by the U. S. Supreme Court of plaintiff's constitutional challenge to N.J.S.A. 2A:31-2. No further action on plaintiff's cross-motions will be undertaken in light of the stay.

2. A copy of this Order shall be served on all parties within 5 days.

/s/ Barbara Byrd Wecker
BARBARA BYRD WECKER, J.S.C.

APPENDIX "N"

ORDER ON MOTION

(Filed: October 14, 1986)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3491-83T3
MOTION NO. M-426-86
BEFORE PART: G
JUDGE(S): FURMAN
PETRELLA
COHEN

JOHN R. CONNOR,

VS

R. G. SACHS, M.D., ET AL

MOTION FILED: September 12, 1986
ANSWER(S) FILED: _____ BY: _____
DATE SUBMITTED TO COURT: October 7, 1986

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 10 DAY OF October, 1986, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT JOHN CONNOR FOR STAY PENDING DISPOSITION OF PETITION FOR CERTIFICATION TO THE SUPREME COURT GRANTED

FOR THE COURT:

/s/ David D. Furman, P.J.A.D.
DAVID D. FURMAN, P.J.A.D.

APPENDIX "N"

(Filed: December 18, 1986)

SUPREME COURT OF NEW JERSEY
M-335 SEPTEMBER TERM 1986
M-336
26,036

JOHN R. CONNOR, etc.,	:	
	:	
Plaintiff-Movant,	:	
	:	
vs.	:	ORDER
	:	
R. G. SACHS, M.D., et al.,	:	
	:	
Defendants-Respondents.	:	

This matter having been duly presented to the Court, it is ORDERED that the motion for the recusal of Chief Justice Wilentz is denied (M-335); and it is further

ORDERED that the motion for stay is dismissed as moot (M-336).

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 16th day of December, 1986.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX "O"

JUDGMENT OF THE SUPERIOR COURT,
CHANCERY DIVISION, ESSEX COUNTY
Docket No. P-392-77
(Filed: May 26, 1978)

In the matter of

THE ESTATE

OF

MARY A. CONNOR, DECEASED.

Before:
DWYER, Chancery Judge.

DWYER, Chancery Judge:

It appearing by the complaint of Hannoch, Weisman, Stern & Besser, Esqs., that Mary A. Connor, late of the County of Essex and State of New Jersey, died on November 24, 1977, intestate; and it further appearing that due notice of the application of the plaintiff has been given to all of the competent adult

next of kin entitled to administration upon the estate of the said intestate, whose right thereto is prior or equal to that of the plaintiff.

It is thereupon on this 25th day of May, 1978, adjudged that letters of administration upon the estate of the said Mary A. Connor be granted to George Warren, Esq., upon his giving bond to the Superior Court of New Jersey in the sum of $5,000.00, conditioned according to law, and with sureties to be approved by this court which amount shall be received upon the filing of the inventory.

/s/ Arthur C. Dwyer
ARTHUR C. DWYER, J.S.C.

APPENDIX "P"

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
ESSEX COUNTY
P-392-77
(Filed: Jul 20, 1978)

In the Matter of the Estate of MARY A. CONNOR, Deceased.	Civil Action LETTERS OF ADMINISTRATION

I, W. Lewis Bambrick, Clerk of the Superior Court of New Jersey, the same being a Court of Record, do hereby certify that by Judgment of the Superior Court of New Jersey, dated May 25, 1978, George Warren was appointed Administrator of the Estate of Mary A. Connor, deceased, late of the County of Essex. The said Administrator has filed his acceptance and duly qualified on July 19, 1978,
And on the 19th of July, 1978, was duly authorized to execute the said estate according to law, as reference to the file in this office will more fully and at large appear.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Trenton, this 20th day of July, 1978.

(SEAL)

/s/ W. Lewis Bambrick
Clerk

APPENDIX "Q"

(Filed: March 24, 1987)

IN THE SUPREME COURT OF NEW JERSEY
DOCKET NO. 26,036/A-3491-83T3

JOHN R. CONNOR,

Appellant,

v.

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N. L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that John R. Connor, the Appellant above named, hereby appeals to the Supreme Court of the United States from the Final Order entered in this action on December 18, 1986, dismissing Appellant's appeal of the Final Judgment of the Appellate Division of the Superior Court of New Jersey,

and becoming final upon the entry of an Order Denying the Motion for Reconsideration entered on January 26, 1987 by the Supreme Court of New Jersey.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ John R. Connor
JOHN R. CONNOR, Pro se
380 Wyoming Avenue
Millburn, New Jersey 07041
(201) 762-5587

Dated: 24 March, 1987

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal to the Supreme Court of the United States was mailed by me this 24th day of March, 1987, via first-class mail, to: JAMES J. CIANCIA, Esq., Assistant Attorney General for the State of New Jersey, Office of the Attorney General, Hughes Justice Complex, Trenton, New Jersey 08625; ROBERT J. LOGAN, Esq., McDonough, Murray & Korn, 555 Westfield Avenue, Westfield, New Jersey 07091 (attorney for defendant Overlook Hospital); and THOMAS J. ALWORTH, Esq., Shanley & Fisher, 131 Madison Avenue, Morristown, New Jersey 17960 (attorney for defendant physicians).

I have also caused to be filed this day a copy of this notice with the Clerk of the

Appellate Division, Superior Court of New Jersey, in Trenton, New Jersey 08625.

/s/ John R. Connor
JOHN R. CONNOR, Pro se

Dated: 24 March, 1987